Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

James S. Smith and Barbara Smith,
Petitioners,

v.

The City of Cumming, a Municipal Corporation, Earl A. Singletary and John Doe,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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23pp

Questions Presented for Review

The Petitioners herein are the owners of a small TV repair shop located in Cumming, Georgia. Although there was no evidence that either Petitioner was engaged in any illegal activities, the police chief decided that he wanted to revoke the Petitioners' business license. The chief then proceeded to encourage customers to make complaints through the magistrate court and/or to city hall. The word was spread that Petitioner James Smith was a drug dealer.

During this period, Petitioner James Smith was attempting to videotape evidence of police misconduct and/or corruption by members of the City of Cumming, Georgia, police department. The Petitioner James Smith was brought before a magistrate on a warrant application that contained materially false allegations made by the Chief of Police Singletary. Petitioner Smith was threatened that if he photographed or videotaped any other police officers of the City of Cumming he would be held without bond in the city jail for a long and undeterminable period of time. Because of these threats, Petitioner ceased all efforts to obtain the evidence of police corruption.

Based upon these actions and several other acts by the police department, the Petitioners brought suit pursuant to 42 U.S.C.A. § 1983. The lower court granted summary judgment to Respondents. The Eleventh Circuit ruled that the Petitioners' First Amendment

Rights were violated, but that the Petitioners had suffered no damages. The questions presented here are:

a. Whether police can determine, without any evidence of Petitioners committing any crime, that a legitimate business is not wanted in the community and can take active steps to intervene in civil disputes and encourage civil complaints in order to have the business license revoked?

b. Whether law enforcement officers may cloak themselves with immunity for violation of free speech through the use of a magistrate to restrain the free speech?

c. Whether the use of the threat of imprisonment without bond, thereby stopping free speech, is a violation of Petitioners' constitutional rights in and of itself?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) the following is a list of all parties to the proceedings:

James S. Smith, Petitioner
Barbara Smith, Petitioner
The City of Cumming, a municipal corporation of the State of Georgia, Respondent
Earl A. Singletary, Respondent

Pursuant to Rule 29.6, counsel states that there is no publicly held corporation or parent corporation in this proceeding.

CITATIONS ENTERED BY THE COURTS BELOW

Smith v. City of Cumming, et al
United States Court of Appeals for the Eleventh Circuit, No. 99-8199, (May 31, 2000)

Smith v. City of Cumming, et al
United States District Court for the Northern District of Georgia

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PETITION FOR WRIT OF CERTIORARI

James S. Smith and Barbara Smith respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 31, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is a published opinion. It is reprinted in the Appendix hereto at page 1.

The opinion of the United States District Court for the Northern District of Georgia that gave rise to the appeal to the United States Court of Appeals for the Eleventh Circuit is a published opinion. It is reprinted in the Appendix hereto at page 5.

JURISDICTION

On January 12, 1999, the United States District Court for the Northern District of Georgia, Atlanta Division, entered an order granting summary judgment to Respondents and a final judgment was issued by the court on that same date.

Petitioners timely appealed to the United States Court of Appeals for the Eleventh Circuit.

On May 31, 2000, the United States Court of Appeals for the Eleventh Circuit issued a published opinion holding that the Petitioners' First Amendment Rights were violated but affirming the lower court's granting of summary judgment to Respondents, finding that Petitioners had suffered no damages.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED IN THIS CASE

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

42 U.S.C. § 1983

STATEMENT OF THE CASE

Suit was initially filed in the United States District Court for the Northern District of Georgia, Atlanta Division, for alleged violations of the Petitioners' federally guaranteed constitutional rights pursuant to 42 U.S.C. § 1983. Federal jurisdiction is pursuant to 29 U.S.C. § 1331.

The Petitioners own and operate a small electronics repair shop in the city of Cumming,

Georgia. They do business as DeCuff Electronics, Inc.

Cumming is a small city located approximately 40 miles north of Atlanta, Georgia.

The shop has been in Cumming for approximately 8 years, and does primarily TV and VCR repairs. (Deposition of James Smith, p. 9, ll. 15-17) The first few years the shop was operated successfully and with no unusual occurrences until 1995.

In 1995, the chief of police for the City of Cumming decided that Petitioners and their small shop should be run out of town. At that time the police department had two chiefs of police, Respondent Singletary and "Buck" Jones.

Despite having no evidence of the Smiths being involved in any illegal activities, Chief Jones, while acting as Chief of Police for the City of Cumming, intentionally injected himself into civil disputes between the Smiths and a few dissatisfied customers. (Deposition of Jones, p. 46, ll. 3-16). The Respondents contend that the Smiths were paranoid and extremely hostile business owners with hundreds of complaints, justifying police action. However, the Respondents have only been able to produce four disgruntled customers out of an eight-year period with over a thousand customers. This is hardly a bad business and a hostile person.

By Chief Jones' own admission, Jones had no evidence to believe that the City of Cumming would be better off if the Smiths packed up and

left. (Deposition of Jones, p. 55, ll. 6-11). Yet, despite the fact that Jones had no evidence of any criminal activity, Jones used these civil complaints as part of his effort to have the city withdraw the Petitioners' business license.

As part of his effort, he (Jones) tried to get as many complaints against the Smiths as possible, feeling that, if he could get enough complaints, he could then go before the mayor and city council and get their business license pulled--even though all of these were civil complaints. (Deposition of Jones, p. 56, ll. 1-14).

By Jones' own admission, there had not been a civil complaint, to his knowledge, since he took over as Chief of Police. (Deposition of Jones, p. 57, ll. 14-17). Yet Jones used his position as chief of police to contact anyone he felt might have a complaint against the Petitioners in order to instigate more civil or criminal complaints. He would tell these people that the police had an ongoing problem with the Smiths. One of the ones Jones contacted was a private investigator hired by the Petitioners. Jones identified himself as the chief of police and tried to get the investigator to give him any information that he (Jones) could use to get the Smiths' business license revoked. (Deposition of Villines p. 17, ll 9-25; p. 18, ll 18-25)

As part of Jones' effort to have the business license revoked, he ran a background check on the Smiths through the NCIC (National Crime Information Center). To do this, he used

the office of the Sheriff of Forsyth County because at that time the city of Cumming was not set up to have direct access. (Deposition of Jones, pp. 58, 59, 60). During his deposition, Jones admitted that the NCIC check was only supposed to be used in a criminal investigation. (Deposition of Jones, p. 60, ll. 2-8). Thus, Jones knowingly violated established federal and state regulations and laws concerning the use of NCIC to make an improper background check on the Petitioners without any justification or probable cause. Some of the information was subsequently used by Respondents' counsel in the deposition of Petitioners.

During this same period rumors began to circulate that the Petitioners were major drug dealers. The source of these rumors appeared to be police and in particular Jones and Singletary.

During the time that Jones was actively trying to encourage people to make complaints against the Smiths, an incident occurred between Mrs. Smith and an officer, Vince Elzey, of the Cumming Police Department.

Barbara Smith was going home after working late one night when she was pulled over by Officer Elzey. The probable cause given by Elsey was that she was "weaving." Mrs. Smith denied any wrongdoing and contends that it was part of the on-going harassment and/or part of a scheme whereby Cumming police officers would, under false pretext, pull over drivers and write bogus tickets in order to increase revenue. This was a matter that had been the subject of conversation among members of the legal

community and other citizens within the city of Cumming ever since Singletary took over as Chief of Police. (Deposition of Deborah Moseley, [a candidate for magistrate judge] p. 22, ll. 4-10; p. 35, ll. 1-8; p. 43, ll. 18-25).

James Smith decided to try to obtain evidence of this alleged improper stopping of vehicles by the police. In order to do this, he used a police scanner and a video camera. Petitioner would randomly follow police cruisers, videotaping them. If they performed a stop, he would videotape the traffic stop. At no time did Petitioner ever interfere with any actions of a police officer, trespass on private property or approach within a sufficient area to cause any fear or interference with police officers. At all times, his videotaping was done from public property. (Deposition of James Smith, p. 91, ll. 24-25; p. 92, ll. 1-7.)

Respondent Singletary approached the magistrate of Forsyth County, Jerry Adams, and swore out an application for an arrest warrant for the videotaping of his police officers. Singletary alleged that the actions of the Petitioner constituted Obstruction of an Officer. Respondent Singletary then proceeded to intimidate and embarrass Petitioner and his wife by charging into the Petitioners' place of business accompanied by multiple police officers and openly stating that the Petitioner James Smith had to come with them to appear in court to answer these charges.

Petitioner Smith was not in the shop at the time of the raid, so instructions were left for

him to report to the magistrate's office as soon as he came in from the service call he was on. Approximately an hour later, Petitioner returned from the service call, and he immediately went to the magistrate's office.

A hearing was then held before the magistrate. Petitioner appeared without benefit of counsel. No recording was made of the criminal proceedings.

Even though it is undisputed that Petitioner committed no criminal act, at the conclusion of the proceedings, the Petitioner was threatened that, if he videotaped police officers performing their job again, he was going to be placed in jail and held without bond for an undetermined period. (Deposition of James Smith, p. 231, ll. 12-18.) It should also be noted that, according to the testimony of Officer Elzey, the affidavit given by the Respondent Singletary, under oath, is false and was known to be false by Singletary at the time he made the affidavit.

Elzey testified that he did not discuss James Smith with Respondent Singletary prior to the hearing, nor did he request that Singletary take any action to stop Smith. (Deposition of Elzey pp. 33-36)

Because of the threat of imprisonment without bond, Petitioners ceased all their efforts to try to obtain the evidence of corruption.

REASONS FOR GRANTING THE WRIT

I. Whether police can determine, without any evidence of Petitioners committing any crime, that a legitimate business is not wanted in the community and can take active steps to intervene in civil disputes and to encourage civil complaints in order to have the business license revoked?

While it is a legitimate police function to investigate crimes and keep track of known criminals, citizens are guaranteed under the First and Fourth Amendments to the Constitution freedom of association and freedom from unreasonable search and seizure.

The constitutional right to privacy first articulated in Griswold v. Connecticut, 381 US 479 (1965) has been expanded to cover a range of personal rights under the First, Fourth, Ninth, and Fourteenth Amendments. Privacy is a paramount Fourth Amendment concern and the prohibition against unreasonable searches and seizures protects against unjustified invasion of privacy. Katz v. United States, 389 US 347 (1967) The Constitution also protects to some extent "the individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 US 589, 599 n.24 (1977).

In the case *sub judice*, the Petitioners had a well recognized right to be allowed to run their business without the interference of the Cumming police department. They had a right not to have the chief of police violate federal and state regulations to obtain an NCIC report

for the express purpose of using any information therein to revoke the Smiths' business license over four civil disputes. They had a right not to have the chief of police injecting himself in civil matters between the Smiths and their customers in such a way as to aide the customers, and to discredit the Smiths.

II. Whether law enforcement officers may cloak themselves with immunity for violation of free speech through the use of a magistrate to restrain the free speech?

The District Court held that by applying to the magistrate for a warrant, the Respondents took the correct action and were acting properly. The District Court further held that Respondent Singletary's actions were covered by qualified immunity.

The magistrate would be immune from liability because of judicial immunity, and is therefore not a party to this suit.

In granting the summary judgment, the District Court did not address the fact that the affidavit executed by Singletary contained false information. Nor did the Court address the fact that holding a citizen without bond when he has not committed any crime was a wanton deprivation of the petitioner's constitutional rights.

As to the First Amendment claim under Section 1983, the Smiths had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather

information about what public officials do on public property, and specifically, a right to record matters of public interest. See Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiffs' interests in filming public meetings is protected by the First Amendment); Fordyce v. City of Seattle, 55 F. 3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); Iacobucci v. Boulter, No. CIV. A. 94-10531 (D. Mass, Mar. 26, 1997) (unpublished opinion) (finding that an independent reporter has a protected right under the First Amendment and state law to videotape public meetings); see also, United States v. Hastings, 695 F. 2d 1278, 1281 (11th Cir. 1983) (finding that the press generally has no right to information superior to that of the general public) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978); Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("[I]t is not just news organizations . . . who have First Amendment rights to make and display videotapes of events . . . ."); Thompson v. City of Clio, 765 F. Supp. 1066, 1070-71 (M.D. Ala. 1991) (finding that city council's ban on member's attempt to record proceedings regulated conduct protected by the First Amendment); cf. Williamson v. Mills, 65 F. 3d 155 (11th Cir. 1995) (reversing district court's grant of qualified immunity to a law enforcement officer who seized the film of and arrested a participant in a demonstration for photographing undercover officers).

The Court of Appeals acknowledged that Petitioners had a First Amendment right to photograph police, but held that, under Section 1983, the Smiths must prove that the conduct complained of deprived them of "a right, privilege or immunity secured by the constitution or laws of the United States." Nail v. Community Action Agency of Calhoun County, 805 F. 2d 1500, 1501 (11th Cir. 1986). Although the Smiths have a right to videotape police activities, they have not shown that the Defendants' actions violated that right.

In this case, the Petitioners were stopped from their protected activity by a false affidavit from Singletary and an unconstitutional threat by Singletary and the magistrate. Through the use of fear and intimidation, the Respondent violated the Petitioners' rights.

Especially on summary judgment, the District court should not have acted as a trier of the credibility of the witnesses. Nor should qualified immunity be given for a clear violation of constitutional rights merely because a magistrate is a party to the unconstitutional acts.

III. Whether the use of the threat of imprisonment without bond, thereby stopping free speech, is a violation of Petitioners' constitutional rights in and of itself?

As set forth in the preceding portion of this Petition, the Petitioners had a First Amendment right to take the videos of the police. However, the appellate court found that while this activity was protected free speech,

that the Petitioners had not shown that their rights had been violated. Respectfully, Petitioners suggest that the appellate court was wrong.

It is undisputed that Petitioners were actively engaged in trying to obtain proof of either police misconduct or police corruption. It is also undisputed that the threats of the police and the magistrate forced the Petitioners to stop this activity.

Actions by the police which interfere with the free exercise of speech, press, and association or which interfere with religious liberties guaranteed by the First Amendment are subject to suit under 42 USC 1983. Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) Furthermore, Law enforcement activities designed to retaliate against persons for criticizing government officials, or filing lawsuits against them, violates the First Amendment. This is true whether the action is an immediate arrest, a later prosecution, or other adverse action. Mackinney v. Nielsen, 69 F.3d 1002, 1007 (9th Cir. 1995); Buffkins v. City of Omaha, 922 F.2d 465 (8th Cir. 1990)

Singletary's actions of bringing a group of armed police officers into Petitioners' place of business, and threatening criminal prosecution for the exercise of Petitioners' First Amendment right, did exactly what Singletary intended his actions to do. Singletary stopped not only Petitioners from gathering evidence, but it also sent a clear message to other members of this small town as to what happens

to anyone who tries to obtain evidence against the police officers.

When Petitioners were frightened into stopping their videotaping by the actions of Singletary and the magistrate, their constitutional rights were violated.

CONCLUSION

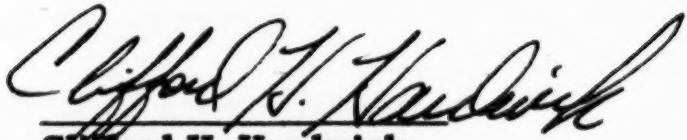
The District Court and the Eleventh Circuit erred in holding that the Petitioners constitutional rights were not violated, and that Singletary was entitled to qualified immunity.

Before granting summary judgment, the District Court should have addressed the issue of false swearing in the affidavit and the clearly unconstitutional threats used against the Petitioner to stop his efforts to obtain evidence of police misconduct.

Because of the importance of citizens efforts to become involved in monitoring the actions of local police departments, the opportunity for abuse of authority in small towns, and the importance of citizens' rights to be free from unconstitutional interference from police, Petitioners respectfully pray that the Supreme Court grant their Petition.

(Signature on following page)

Respectfully submitted,



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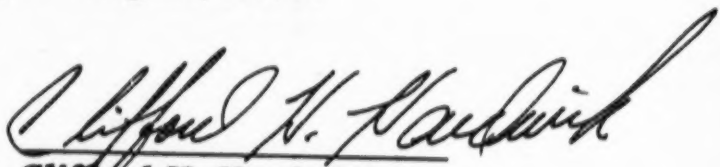
(770) 772-4700

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Respondents with three true copies of the foregoing Petition for Writ of Certiorari by depositing same in the U.S. Mail, with proper postage affixed thereto, and addressed as follows:

Thomas G. Tidwell, Esq.
400 Suntrust Plaza
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Atlanta, Georgia 30308
404-614-7400

This the 25th day of August, 2000.



Clifford H. Hardwick
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 99-8199

D.C. DOCKET NO. 97-01753-1-CV-JEC

JAMES SOLOMAN SMITH, JR., BARBARA SMITH,

Plaintiffs-Appellants

versus

CITY OF CUMMING, a Municipal Corporation, EARL A. SINGLETARY, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia

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(May 31, 2000)

Before BIRCH and BARKETT, Circuit Judges, and ALARCON, Senior Circuit Judge.

BARKETT, Circuit Judge:

***Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.**

James and Barbara Smith filed suit against the City of Cumming, Georgia (the "City"), and its police chief, Earl Singletary, pursuant to 42 U.S.C. § 1983, alleging that the City police had harassed the Smiths, including a claim that Mr. Smith had been prevented from videotaping police actions in violation of Mr. Smith's First Amendment rights. They appeal from summary judgment granted to the City and Singletary and from the denial of the Smith's motion to amend their complaint so as to name another City police chief, Ralph "Buck" Jones,[1] as a defendant in the place of a defendant originally identified as "John Doe." We affirm.

As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest. See Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiffs' interests in filming public meetings is protected by the First Amendment); Fordyce v. City of Seattle, 55 F. 3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public

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1 Jones and Singletary served together for several months a co-chiefs of police. Later, Singletary was chosen as chief, when he left Cumming, Jones succeeded him as chief.

interest"); Iacobucci v. Boulter, No. CIV. A. 94-10531 (D. Mass, Mar. 26, 1997) (unpublished opinion) (finding that an independent reporter has a protected right under the First Amendment and state law to videotape public meetings); see also, United States v. Hastings, 695 F. 2d 1278, 1281 (11th Cir. 1983) (finding that the press generally has no right to information superior to that of the general public) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978); Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("[I]t is not just news organizations . . . who have First Amendment rights to make and display videotapes of events . . . ."); Thompson v. City of Clio, 765 F. Supp. 1066, 1070-71 (M.D. Ala. 1991) (finding that city council's ban on member's attempt to record proceedings regulated conduct protected by the First Amendment); cf. Williamson v. Mills, 65 F. 3d 155 (11th Cir. 1995) (reversing district court's grant of qualified immunity to a law enforcement officer who seized the film of and arrested a participant in a demonstration for photographing undercover officers). Thus, the district court erred in concluding that there was no Fist Amendment right.

Nonetheless, under Section 1983, the Smiths must prove that the conduct complained of deprived them of "a right, privilege or immunity secured by the constitution or laws of the United States." Nail v. Community Action Agency of Calhoun County, 805 F. 2d 1500, 1501 (11th Cir. 1986). Although the Smiths have

a right to videotape police activities, they have not shown that the Defendants' actions violated that right. We find no merit in the remaining arguments presented in this appeal. AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES S. SMITH, and BARBARA SMITH,	:	
	:	
Plaintiffs,	:	
	:	**CIVIL ACTION NO.**
v.	:	**1:97-CV-1753-JEC**
	:	
THE CITY OF CUMMING, a Municipal Corporation, EARL A. SINGLETARY and JOHN DOE,	:	
	:	
Defendants.	:	

ORDER

This case is presently before the Court on defendants' Motion for Summary Judgment [35]. The Court has reveiwed the record and the arguments of the parties and, for the reasons set out below, concludes that defendants' Motion for Summary Judgment should be GRANTED as to all federal claims, and that plaintiffs' state law claim of defamation should be DISMISSED without prejudice.

BACKGROUND

Plaintiffs filed this suit pursuant to 42

U.S.C. § 1983, claiming violations of their First, Fourth and Fourteenth Amendment rights and, furthermore, that they are the subject of a conspiracy designed to deprive plaintiffs of their federally guaranteed constitutional rights of due process and equal protection. Additionally, plaintiffs allege the state law claim of defamation *per se*.

A. Incidents alleged by plaintiffs giving rise to this action

Plaintiffs present a lengthy, convoluted account of their interactions with the police department in the City of Cumming, Georgia. Plaintiffs, however, are unclear as to which actions comprise what alleged constitutional violation. To aid in clarifying the issues, the Court will set forth the factual allegations compartmentally, to reflect clearly each incident at issue in this case. Then, in its legal analysis, the Court will discuss each incident in light of the numerous alleged constitutional violations.

1. Incident involving Sarah Miles

Plaintiffs maintain that their relationship with the police department changed after they filed a police report against Sarah Miles. (Pl. Response [46] at 6.) The affairs leading up to this point are rather unusual and are as follow.

The Smiths enlisted the help of Vaun Pendley, their part-time employee, as a sperm donor in their efforts to artificially inseminate Mrs. Smith. Specifically, on six different occasion, James Smith paid Pendley fifty dollars

to ejaculate into a condom. (J. Smith Dep. at 117-120; V. Pendley Dep. at 33-35.) James Smith then attempted to inseminate his wife by inserting Pendley's donation into Barbara Smith with the aid of a turkey baster. (J. Smith Dep. at 117.)

Sarah Miles, Pendley's girlfriend at the time, learned of Pendley's involvement as a donor and became angry. (*Id.* at 121.) The Smiths allege that Sarah Miles became so angry, in fact, that she approached Jason Lingerfelt, Pendley's cousin, and offered to pay him one-hundred dollars and to have sexual relations with him if he would "shoot up" the Smiths' house while they were in the house. (*Id.* at 126-27; *see also* Lingerfelt Dep. at 15.) Lingerfelt told James Smith about Sarah's offer and then accompanied him to the police station to file a report. (Lingerfelt Dep. at 15-16.)

At the police station, Lingerfelt and Smith spoke with Assistant Chief of Police Ralph "Buck" Jones.[1] Chief Jones prepared an incident report and took statements from Micheal Pugh and Vaun Pendley as well.[2] Additionally, the police asked Lingerfelt to call

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1 Jones is currently Chief of Police in Cumming, Georgia.

2 Plaintiffs point out that the Cumming Police Department claims to have lost all of the files and evidence pertaining to the "Sarah Miles incident." (See Jones Dep. at 31.)

Sarah Miles, then monitored and taped a conversation in which Miles asked Lingerfelt to shoot up the Smiths' house. (Lingerfelt Dep. at 16; J. Smith at 129.) As a result, the police instructed Lingerfelt to set up a meeting with Sarah Miles at a hotel room so that Miles could provide Lingerfelt with a weapon, however Miles never appeared. (Jones Dep. at 34-35.)

The assistant district attorney advised the police that they did not have enough evidence to make an arrest at that point and, absent some overt action taken by Ms. Miles, they should not arrest her. (Jones Dep. at 35-36.) Instead, the police called her in for a conference, advised her of her rights, explained the complaint filed against her and further explained the offenses with which she could be charged. (*Id.* at 36.) Miles denied the accusations but indicated that she would return to West Virginia with her father. The police and the assistant district attorney concluded that, once she left town,[3] the matter should be dropped. (*Id.*) Furthermore, after a conversation with a district attorney, the Smiths chose not to pursue a prosecution of Miles. (J. Smith Dep. at 142-43.)

Plaintiffs are angry because Sarah Miles was allowed by the police to "walk away scot free from an attempted murder." (Pl. Response

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3 Plaintiffs maintain that Sarah Miles currently works in the Forsyth County area and does not reside in West Virginia. (Patterson Dep. at 6.)

[46] at 6.) Because the police did not "perform an investigation and/or arrest [Miles]," plaintiffs contend that the police "refused to take steps to protect the Plaintiffs." (Compl. [1] at ¶¶ 9-10.) Moreover, plaintiffs maintain that they had no trouble with the police until James Smith filed charges against Sarah Miles.

2. Incident involving Lingerfelt's attempted drug buy

During the time in which the incident involving Sarah Miles ensued, both Miles and Lingerfelt told police that the Smiths kept drugs in their shop and that they provided drugs to others.[4] (Jones Dep. at 37; Lingerfelt Dep. at 21.) Specifically, when she met with the police, Sarah Miles told police that the Smiths kept drugs at their shop and supplied Vaun Pendley with drugs on numerous occasions. (Jones Dep. at 37.) When Smith and Lingerfelt went to the police station to file charges against Miles, Jason Lingerfelt told the police that James Smith kept marijuana at his store and that Smith had given it to him on occasion. (Lingerfelt Dep. at 20.)

Smith, in turn, told the police that Lingerfelt had pills in his pocket. Thus, Chief Jones told Lingerfelt that he would not charge

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[4] Also, Martha McConnell, mother of Vess, Vaun and Vince Pendley, informed the City of Cumming Police Department that her sons were smoking marijuana with James Smith. (Def. Mot. for Summ. J. [35], Ex. H. McConnell Aff. at ¶ ¶ 8-9.)

him with a felony for bringing drugs onto police property if Lingerfelt would help him "bust James." (*Id.*) Lingerfelt used the police department's marked money in an attempt to buy marijuana from James Smith, but Smith told Lingerfelt he did not have any marijuana and Lingerfelt left the store.[5] (*Id.* at 21.)

According to Chief Jones, the police department made no further attempts to investigate the Smiths. (Jones Dep. at 38-42.) After Lingerfelt's attempted drug buy, however, plaintiffs allege that "there was a series of unusual incidents whereby total strangers would walk into the shop and ask to buy drugs." (Pl. Response [46] at 6 (citing J. Smith Dep. at 11).)

3. Incident involving Vess Pendley's arrest

In July, 1997, Vess Pendley (brother of Vaun Pendley) was arrested by police officers from the Forsyth County Sheriff's Department. Vess, who according to plaintiffs has a history of drug abuse and criminal conduct, called the Smiths from the Forsyth County Jail and claimed that a plain clothes officer solicited him

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5 Lingerfelt states that he did not tell Smith the police sent him. (Lingerfelt Dep. at 21.) The police believe that Lingerfelt did inform Smith that the police sent him because shortly after Lingerfelt entered the repair shop "Smith came to the door and looked out and kind of glared at us, and Lingerfelt came back out, so it was kind of safe to assume that Lingerfelt told him why he was in there . . . ." (Jones Dep. at 38.)

to attempt a drug buy from the Smiths. Furthermore, Vess told the Smiths that the officer warned him that if he did not cooperate he would be kept in jail for a prolonged period of time. (Pl Response [46] at 12-13 and Ex. 2, Statement of Vess Pendley.)

Vess Pendley and plaintiffs maintain that the jail officers refused to provide Pendley with towels, soap, and Vaseline to treat his skin condition, psoriasis, because he would not agree to the scheme proposed by the plain clothes officer. Plaintiffs' counsel contacted the Sheriff's Department regarding this matter and, plaintiffs contend, "the plot to set up a drug buy was known, the calls [from Pendley] stopped and Pendley . . . was given showers, medication, and treated for his medical condition." (*Id.* at 13.)

Plaintiffs allege that the arrest of Vess Pendley was part of the conspiracy fashioned by the City of Cumming Police Department to deprive them of their constitutional rights. The arrest of Vess Pendley, they contend, resulted after defendant Singletary took a position with the Forsyth County Sheriff's Office. (Pl. Response [46] at 12.)

4. Incident involving alleged defamation of Smiths

The Smiths allege that since the incident involving Lingerfelt's attempted drug buy, "the Cumming Police Department has, without any foundation whatsoever, began [sic] to circulate false and malicious reports among the other business persons and citizens of Cumming that

the plaintiffs were drug dealers and/or vicious people." (Compl. [1] at ¶ 11.) For example, James Smith maintains that the owner of a restaurant located in the same shopping center as the Smiths' store indicated that Chief Singletary [6] previously told him that James Smith was a drug dealer. (Pl. Response [46] at 7 (citing J. Smith Dep. at 68).)

However, each of the store owners in the shopping center, including the restaurant owner, have submitted affidavits stating that they have never heard Chief Singletary, any person employed by the City of Cumming or any person employed they the City of Cumming Police Department accuse the Smiths of being drug dealers, of being involved with drugs, or of being vicious people. (Def. Mot. for Summ J. [35], Ex. B, Wengler Aff.; Ex. C., Smalley Aff.; Ex. D., Adams Aff.) Additionally, the Smiths' private investigator, John C. Villines, testified that, as a result of his own investigation, he found no one with contact to the Smiths or the business that believed the Smiths were dealing drugs. (Villines Dep. at 47-48.) Nevertheless, plaintiffs maintain that they have been defamed by the City of Cumming through police officers acting as its agents.

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6 Earl A. Singletary, a defendant in this action, was Chief of Police before Ralph "Buck" Jones – previously Assistant Chief of Police – assumed the position.

5. Incidents involving Chief Jones's alleged attempt to have Smiths' business license revoked

Plaintiffs contend that because the police were unable to pin them with criminal charges, Chief of Police Buck Jones attempted to collect civil complaints from the Smiths' customers in an effort to have the Smiths' business license pulled. The Smiths maintain that "Jones used his position as chief of police to contact anyone he felt might have a complaint against the Plaintiffs in order to instigate more civil or criminal complaints." (Pl. Response [46] at 8.) The Smiths allege that Chief Jones told people that the police had an ongoing problem with the Smiths. (*Id.*)

Specifically, plaintiffs' private investigator, John C. Villines, states that Chief Jones contacted him because Jones understood that Villines had been working on a case involving some problems at Decuff Electronics; Jones, however, did not realize that Villines worked for the Smiths, but believed that Villines worked, instead, for a customer who had a complaint against the Smiths. (Villines Dep., at 17-18 and Ex. B.) Villines recalls that Chief Jones was seeking adverse information about James Smith because the police department had experienced numerous problems with Smith. Ultimately, Villines recounts that Chief Jones was looking for additional documentation of such problems so that he could attempt to have Smiths' business license pulled. (*Id.*)

Additionally, the Smiths allege that, in

Jones' effort to have their business license revoked, Jones ran a background check on them through the National Crime Information Center (NCIC) using access provided by Forsyth County Sheriff's Office. (Pl. Response [46] at 9 (citing Jones Dep. at 58-60).) Because the Smiths believe Jones used the NCIC check for civil purposes, although the check should only be used in a criminal investigation, they allege that he violated their constitutional right to privacy (*Id.*)

Defendants reply that Jones testified that he did not remember what type of background check was conducted, but that he did in fact conduct a background check because the police department had received numerous complaints about the Smiths and he wanted to see, essentially, what kind of character the police were dealing with and whether James Smith was wanted. (Def. Reply [49] at 11 (quoting Jones Dep. at 59).) Defendants maintain that Jones did not run a background check in an attempt to revoke the Smiths' business license. (*Id.*) Moreover, defendants contend that there is no evidence that Chief Jones obtained confidential records or information that was not of public record in violation of the Smiths' right to privacy.

6. Incident involving traffic ticket issued to Barbara Smith

Next, the Smiths allege that Barbara Smith was pulled over by Officer Elzey late one evening as she was leaving work and was given

a ticket for having no proof of insurance, although Officer Elzey initially pulled her over because he observed Mrs. Smith weaving. Barbara Smith denies that she was weaving and "contends that it was part of the on-going harassment and/or part of a scheme whereby Cumming police officers would, under pretext, pull over drivers and write bogus tickets in order to increase revenue." (Pl. Response [46] at 10.) Additionally, plaintiffs claim that they are not being paranoid, but that this has been the subject of conversation among many persons in the community "ever since Singletary took over as Chief of Police." (*Id.*)

Officer Elzey testifies that he stopped Barbara Smith shortly after midnight after he observed her vehicle cross over the center line of a straight road several times. (*Id.* at 19-20.) Elzey states that it is his "rule of thumb" not to stop someone for weaving unless he observes the conduct at least more than once; however, if the driver continues to cross over a center line, he stops them to ensure that they are not falling asleep or under the influence of some substance. (*Id.* at 19.) Furthermore, Officer Elzey recounts that he did not know who she was until he pulled her over and, even then, he did not know who her husband was until after he had written the ticket and she told him that her husband was James Smith who owned DeCuff Electronics. (*Id.* at 25.)

As a result of this incident, James Smith filed a lawsuit against Officer Elzey, claiming the issuance of the ticket to Barbara Smith had

resulted in the loss of affection. (Elzey Dep. at 26.) Mr. Smith dismissed the lawsuit later. (*Id.*)

7. Incident involving James Smith's videotaping police at traffic stops resulting in magistrate proceedings

After Barbara Smith was issued the ticket, James Smith attempted to obtain evidence that the police were improperly stopping vehicles. To get "dirt" on the police officers, James Smith drove around town videotaping police cruisers. (J. Smith Dep. at 92, 211.) If the police officers performed a traffic stop, he videotaped the stop as well. Smith videotaped officers on at least six different occasions, but admits that he does not have adequate proof of a "weaving scheme" whereby police officers would stop innocent citizens on the pretext that they were weaving and then issue a ticket for something else. (*Id.* at 211.)

Smith maintains that he did not interfere with the police officer's ability to perform their duties, and that all videotaping was performed on public property. (Pl. Response [46] at 10 (citing Dep. Smith at 91-92).) Officer Elzey, however, stated that this conduct was distracting and took his focus away from the vehicle stops. (Elzey Dep. at 39.)

Several police officers came to Chief of Police Singletary and informed him that James Smith was following them and taking pictures. Because these officers did not know Smith's motive or intent, Smith's actions made them nervous and they felt that their safety was

jeopardized. (Singletary Dep. at 21-23.) Thus, the officers asked Chief Singletary to take some sort of action to stop Smith from continuing in this manner.

Singletary believed that Smith was interfering with the law enforcement officer's ability to perform their job correctly. (*Id.* at 21.) Accordingly, Singletary applied for a warrant for James Smith's arrest for the obstruction of law enforcement officers under Singletary's charge. (*Id.* at 20, 25.) James Smith was not arrested, but was asked to appear at a show cause hearing before a magistrate judge. The magistrate judge told Smith that if he continued to follow the police and videotape them while on duty, he would be arrested. (J. Smith Dep. at 38-39; B. Smith Dep. at 248.) The Smiths conclude that Singletary's actions deprived them of their First and Fourth Amendment rights.

8. Incident involving landlord's request that plaintiff remove sign from storefront

Plaintiffs allege that defendants caused their landlord to believe that they are undesirable tenants. (Comp. [1] at ¶31.) Also, they allege that "the city of Cumming, through its agents, have (sic) continuously harassed the Plaintiffs through efforts to force the Plaintiffs to remove signs from the building and other actions that were designed to close the Plaintiff's business and force them to move elsewhere." (*Id.* at ¶ 32.) Plaintiffs maintain that their landlord told them that the City of

Cumming wanted the sign removed. (J. Smith Dep. at 65.)

Plaintiffs have not presented any evidence that their landlord has asked them to vacate the premises. Although the landlord asked the Smiths to remove a sign connected to the storefront, the landlord attests that no one affiliated with the City of Cumming asked him to require the Smiths to remove the sign. (Ahlzadah Aff. at ¶ 5.) Moreover, even James Smith testified that no one affiliated with the City of Cumming asked him to take down the sign, but that only his landlord made such a request. (J. Smith Aff. at 59-60.) The sign has not been removed, and the Smiths have not been asked lately to remove it. (*Id.* at 59.) Additionally, it is important to note that plaintiffs' response does not even address the sign issue. (See Pl. Response [46].)

9. Failure to provide police support

Plaintiffs claim that, since 1995 the police department of the City of Cumming has refused to provide requested police support to DeCuff Electronics to deal with customer-related problems. (Pl. Compl. [1] at ¶ 12.) Specifically, plaintiffs allege that members of the police department refused to enforce the law regarding trespassers or persons threatening plaintiffs. (*Id.* at ¶ 13.) Also, plaintiffs complain that a police officer refused to draft a written incident report when plaintiffs complained about a third party threatening them with physical violence at plaintiffs' place of business. (Id. at ¶ 14.)

B. Defendants' request for summary judgment as to all claims

Both defendants have moved for summary judgment on all claims asserted against them. Defendants argue that there is no evidence of any constitutional violation or of any defamation. Additionally, Officer Singletary argues that even if there is such evidence, he is protected by the doctrine of qualified immunity. After setting forth the standard to be applied in deciding a summary judgment motion, the Court will address, in turn, claims asserted against the City of Cumming and against Officer Singletary in his official capacity, then claims against Officer Singletary in his individual capacity.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact's materiality is determined by the controlling substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50.

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the

merits. Instead, Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323. However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleading" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324. While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no

genuine issue of material fact." *Anderson*, 477 U.S. at 247-48 (1986).

II. PLAINTIFFS' § 1983 CLAIMS

In order to state a claim under § 1983, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct 2250, 101 L.Ed.2d 40 (1988) (citations omitted). As stated above, plaintiffs' complaint alleges violations under the First, Fourth, and Fourteenth Amendments, and the parties agree that defendants were acting under color of state law at the time of the events in question.

Before the Court walks through its discussion of whether any genuine issue of material fact exists with regard to the constitutional violations alleged by plaintiffs', the Court observes the following. Plaintiffs make sweeping allegations that their First, Fourth and Fourteenth Amendment rights have been violated, but do little to indicate *which* factual allegations are tied to *what* legal theory. The Court – and defendants, for that matter – has been left to sift through plaintiffs' barrage of encounters with the City of Cumming and its police department in order to attempt to discern *what* incident or incidents could constitute, for example, a breach of plaintiffs' equal protection or due process rights. Even plaintiffs' brief in response to defendants'

summary judgment motion is filled with cursory, unhelpful statements such as this: "Not only has their reputation suffered, but they have been deprived of the right to enjoy their porperty (sic) . . . , their relations with their landlord has (sic) been damaged. . . . Thus, they have meet (sic) the burden set by [a cited case] by showing the defamation was accomplished by an infringement of a Fourth Amendment Right." (Pl. Response [46] at 22-23.) Plaintiffs' brief does little to show *how* the facts alleged actually compose the constitutional violations asserted.

Plaintiffs' complaint is a classic example of "shotgun pleading." *See GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359, 1368 (11th Cir. 1998); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1483-84 (11th Cir. 1992); *Pelletier v. Zweifel*, 921 F.2d 1465, 1518 (11th Cir. 1991). That is, it presents countless allegations, regardless of their relevance, and merges them into a few generalized claims for relief based on a fortuitous smattering of asserted constitutional rights. One of the purposes of summary judgment is "to unmask frivolous claims and put a swift end to meritless litigation," a purpose particularly relevant here where plaintiffs employ a haphazard "shotgun" approach to litigation. *Fullman v. Graddick*, 739 F.2d 553, 557 (1984). Plaintiffs are represented by counsel, thus the Court should not have to view their pleadings and legal arguments with the indulgence afforded to *pro se* litigants. Nevertheless, the Court has been left to the cumbersome task of sorting through

a myriad of factual allegations in an attempt to determine their relevance to plaintiffs' legal claims. Thus, viewing all evidence and factual inferences n the light most favorable to the non-moving party, the Court has, to the best of its ability, applied the facts alleged to the constitutional rights cited by plaintiffs.

A. Municipal Liability

Plaintiffs bring claims under section 1983 against the City of Cumming and against Earl A. Singletary in his official capacity. A claim filed against an individual in his official capacity is synonymous with a claim against the local government entity he or she represents. *Owens v. Fulton County*, 877 F.2d 947, 951 n.5 (11th Cir. 1989) (citing *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)). Thus, the claim against defendant Singletary in his official capacity will be analyzed in conjunction with the claim against the City of Cumming.

In response to plaintiffs' claim, defendants contend that there is no evidence that actions taken by police officers within the City of Cumming Police Department manifest a policy, custom or practice of violating citizens' First, Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983. Because municipal liability may *not* be imposed by means of *respondeat superior* alone, a local government is only liable for the actions of its employees under section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by

those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018 56 L.Ed.2d 611 (1978) A policy is defined generally as "a course of action consciously chosen from among various alternatives . . . ." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 2436, 85 L.Ed.2d 791 (1985). A custom, on the other hand, is an informal practice that takes on the force of law as a result of its widespread use by state officials. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986); *Monell*, 436 U.S. at 691, 98 S. Ct. 2018. Moreover, "random acts or isolated incidents are insufficient to establish a custom or policy." *Depew v. City of St. Mary's*, 787 F.2d 1496, 1499 (11th Cir. 1986).

In order to proceed with a claim brought under section 1983, a plaintiff must not only establish the existence of a policy or custom violative of constitutional rights, but municipal liability will not attach unless he also demonstrates that the city policy or custom was the "moving force" or cause behind the alleged constitutional violation. *Monell*, 436 U.S. at 694, 98 S. Ct. 2018. Additionally, the Eleventh Circuit requires that a plaintiff demonstrate a measure of actual *fault* in the city's adoption of a custom or policy in order to establish a claim for municipal liability under section 1983. *See Owens v. City of Atlanta*, 780 F.2d. 1564, 1567 (11th Cir. 1986). To omit this requirement would, according to the court, allow recovery on

the basis of vicarious liability. *Id.*

Plaintiffs have pointed to no formal policy of the City of Cumming which infringes constitutional rights. Accordingly, under the municipal liability theory they have chosen to pursue, plaintiff has the burden, for summary judgment purposes, of pointing to competent evidence of sufficient prior incidents of First, Fourth, and Fourteenth Amendment violations by Officer Singletary or other City of Cumming police officers to create a genuine question as to whether the city had an informal policy or custom that violated plaintiffs' rights. Whether plaintiffs have met this burden with regard to each right allegedly violated by defendants is addressed below.

1. First Amendment

Plaintiffs contend that Chief Singletary's request for a show cause hearing before the magistrate judge to determine whether James Smith could continue following police officers and videotaping their activities was a violation of their First Amendment right to the free exercise of speech, as well as a violation of their right to due process of law under the Fourteenth Amendment. The alleged due process violation will be addressed *infra*, however, whether plaintiff James Smith holds a First Amendment right to videotape police officers in the performance of traffic stops is addressed here.

Certainly, "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers . . . . The

freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Houston v. Hill*, 482 U.S. 451, 461-63, 107 S.Ct. 2502, 2509-11, 96 L.Ed.2d 398 (1986). Smith claims that he undertook to videotape police activity to investigate and prove that police were stopping vehicles improperly on the pretext of "weaving." Nowhere does Smith allege, however, that his videotaping action was intended to represent a verbal challenge to police action.

Although certain symbolic acts constitute speech for First Amendment purposes, Smith's act of videotaping police officers is not within this category of speech. *See, e.g., Schad v. Borough of Mount Ephriam*, 452 U.S. 61, 66, 101 S. Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) (nude dancing is constitutionally protected expression); *Tinker v. Des Moines School District*, 393 U.S. 503, 505-06, 89 S. Ct. 733, 736, 21 L.Ed.2d 731 (1969) (wearing black armbands to school is equivalent of speech); *Stewart v. Baldwin County Board of Educ.*, 908 F. 2d 1499, 1505 (11th Cir. 1990) (act of leaving meeting was conduct "sufficiently imbued with elements of communication" to implicate First Amendment protections) (citation omitted). In *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974), the Supreme Court established the test for determining whether a symbolic act constitutes speech protected by the First Amendment: "there must be (1) an

intent on the part of the actor to convey a particularized message, and (2) circumstances surrounding the act such that the likelihood is great that the message will be understood by those who view it." *Stewart*, 908 F. 2d at 1504 (citing *Spence*, 418 U.S. at 410-11, 94 S. Ct. at 2730)).

Smith has not alleged any intent to convey a message to the City of Cumming Police Department by videotaping police officers, only an intent to "investigate." Moreover, the record is clear that the police who encountered Smith in his "investigation" did not understand his action as a protest. In actuality, the police officers reported to Chief Singletary that they could not discern Smith's motive or intent and that Smith's actions made them nervous. (Singletary Dep. at 21-23). Accordingly, the Court finds that Smith's videotaping action does not constitute protected activity sufficient to evoke the protection of the First Amendment.[7]

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[7] **One can distinguish *Iacobucci v. Boulter*, 1997 WL 258494 (D. Mass. March 26, 1997), in which the court did not establish, but alluded to the plaintiff's First Amendment right to videotape or film a public meeting of the Town of Pembroke Historic District Commission. In *Iacobucci*, the plaintiff was a member of the press, a statute expressly required that all governmental meetings be open to the public, and the plaintiff was not disturbing the public meeting in any way. *Iacobucci*, 1997 WL 258494, at ** 2-7. Similarly, one can distinguish *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), in which the court discussed a plaintiff's First Amendment right to record public events and to "gather news." *Fordyce*, 55**

Additionally, the Court notes that the Georgia Code prohibits the knowing or willful obstruction or hindrance of any law enforcement officer in the discharge of his official duties. O.C.G.A. § 16-10-24 (1997).[8] The Georgia legislature intended this section to "include forms of speech which may reasonably be interpreted as a 'threat of violence' and which amount to an obstruction or hindrance." *Wells v. State*, 154 Ga. App. 246, 248, 268 S.E.2d 74 (1980). Because Smith did not

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F.3d at 438. In *Fordyce*, the plaintiff videotaped a demonstration – specifically, he videotaped the police officers' reaction to a protest – for use on local television, and was arrested under a controversial Washington State privacy statute for filming bystanders against their wishes. *Id.*

Also, distinguish *Lambert v. Polk County, Iowa*, 723 F. Supp. 128 (S.D. Iowa 1989), in which the court, in impassioned dicta, states that all citizens have "First Amendment rights to make and display videotapes of events . . . ." *Lambert*, 723 F. Supp. at 133. Ultimately, however, *Lambert* did not address the right to *make* a videotape, but the right to "have and display and disseminate" a videotape. *Id.* At 134.

[8] Georgia Code Section 16-10-24 states, in relevant part:

> Except as otherwise provided . . ., a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.

O.C.G.A. § 16-10-24(a) (1997).

identify himself or his purpose when videotaping, the police officers were made quite uncomfortable by his actions and were unable to "concentrate on [the] dangerous situation" presented by traffic stops. (Singletary Dep. at 27-28). Thus, even if Smith's videotaping activity was sufficient to constitute "speech," Chief Singletary only requested the hearing before the magistrate judge because he believed the police officers for whom he was responsible were obstructed from the performance of their duties in accordance with section 16-10-24 – a statute that contemplates the limitation of some speech in order to effectuate its purpose. *Wells*, 154 Ga. App. at 248; *see also Moccia v. State*, 174 Ga. App. 764, 331 S.E.2d 99 (1985), and *Dumas v. State*, 159 Ga. App. 517, 284 S.E. 2d 33 (1981).

Accordingly, plaintiff's First Amendment rights have not been violated by defendants' actions[9] and defendants' motion for summary judgment with regard to plaintiff's claim under section 1983 for the violation of plaintiffs' First Amendment rights is granted.

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9 Plaintiffs maintain that the magistrate judge's order to stop videotaping the police officers was legally unsupportable under section 16-10-24 of the Georgia Code. Plaintiffs have not brought an action against the magistrate judge, however, and have not sought review of that decision. Thus the validity of the magistrate judge's order is not properly before this Court and the Court's findings herein should not be interpreted as an affirmance of such order.

2. Fourth Amendment

a. Malicious prosecution

Plaintiffs also argue that defendants violated their Fourth Amendment rights because plaintiffs were the subjects of "intimidation and malicious prosecution." (P1. Response [46] at 20.) The Eleventh Circuit has recognized malicious prosecution as a constitutional tort cognizable under section 1983 and the Fourth Amendment. *Uboh v. Reno*, 141 F.3d 1000, 1002 (11th Cir. 1998); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). In *Whiting*, the Eleventh Circuit stated:

> **Labeling . . . a section 1983 claim as one for a "malicious prosecution" can be a shorthand way of describing a kind of legitimate section 1983 claim: the kind of claim where the plaintiff, as a part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.**

Whiting*, 85 F.3d at 584. A plaintiff may pursue a claim of malicious prosecution via the Fourth Amendment where the claim is based "on some actual unlawful, forcible, restraint of his person." *Id.

Plaintiff James Smith states that his claim of malicious prosecution arose because he was subjected to a warrant hearing before a magistrate judge as a result of Chief Singletary's

application for a warrant. According to plaintiffs, the magistrate judge told Smith that if he continued videotaping the police officers he would be held in the city jail without bond. (P1. Response [46] at 20.) James Smith admits, however, that no police officer threatened him with jail if he did not stop filming police activity. (J. Smith Dep. at 231-32.) Furthermore, Smith was never arrested or placed in police custody as a result of his videotaping endeavor.

In summary, James Smith was not "seized" – that is, there was no *actual, forcible* restraint of his person – thus his claim of malicious prosecution must fail. See *Dolin v. West*, 22 F. Supp.2d 1343, 1351 (M.D. Fla 1998) (Malicious prosecution claim asserted under section 1983 and Fourth Amendment failed because plaintiff did not assert that she was forcibly restrained, merely that certain parties recommended her arrest). The mere submission of an application for an arrest warrant is not a "seizure." Although the submission of an application may constitute the institution of a prosecution, the plaintiff must be arrested or otherwise seized *after* the warrant is issued to state a claim for malicious prosecution. In *Whiting*, the court specifically contemplated that an arrest would be made "after the filing of an information" and that the *arrest* – not the mere institution of a prosecution – would form the basis of a Fourth Amendment section 1983 claim. *Whiting*, 85 F.3d at 585-86 & n.7.

Furthermore, in recognizing malicious

prosecution as a cause of action under section 1983, the Eleventh Circuit relied on *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994), a case in which the plaintiff proved a Fourth Amendment violation by showing "an arrest in fact, followed by an unlawful warrant application and physical restraint." *Whiting*, 85 F.3d at 584 n.4. (citing *Kelly*, 21 F.3d at 1555). James Smith was neither arrested nor physically restrained as a result of the warrant hearing before the magistrate judge. Instead, he was told that any subsequent videotaping activity would be considered interference with the police in the performance of their duties and, in the future, he would be arrested for such endeavors. Moreover, Smith has provided no support for his assertion that the warrant application or the magistrate judge's resulting order was unlawful. Adhering to the Eleventh Circuit's admonition that, "[w]here the right said to be violated is the Fourth Amendment, the plaintiff must establish a *concrete* violation of that right," *Whiting*, 85 F.3d at 586 (emphasis added), the Court finds that summary judgment is appropriate with regard to plaintiffs' claim of malicious prosecution because plaintiff was never unlawfully "seized" in violation of the Fourth Amendment.

b. Privacy

Additionally, plaintiffs' claim that defendants violated their Fourth Amendment right to privacy "by violating federal and state regulations to obtain an NCIC report for the exspress (sic) purpose of using any information

therein to revoke the Smiths' business license . . . ." (P1. Response [46] at 25.) Plaintiffs maintain that Chief Jones even acknowledged that "the NCIC report was imporper [sic]." (*Id.* at 25-26.) Chief Jones avows that he only conducted a background check on James Smith because the police department had received complaints about Smith. At least one complaint alleged that James Smith assaulted a customer;[10] therefore Chief Jones wanted find out whether Smith had a criminal record. Whether the background check was conducted via the NCIC system, Jones could not recall. (Jones Dep. at 59.) Plaintiffs respond that no more than four complaints were filed against them with regard to what they consider to be

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Two customers, Theresa and Renee Gray, filed a complaint with the police department and swore out a warrant against James Smith for assault and battery after an incident at DeCuff Electronics. (P1. Brief in Supp. of Mot. for Summ. J. [35], Ex. G, R. Gray Aff. at ¶ 7.) The jury found in favor of James Smith and Smith, in turn, filed a civil action against the Grays. (*Id.*, R. Gray Aff. at ¶ 10.) The police were called during a dispute between James Smith and Pat Chandler, another customer. She stated that she "had never been treated in such a rude and violent manner by a businessman before" and that, "based on his irrational behavior, [she] did not know what he was capable of doing to [her]." (*Id.* Ex. E, Chandler Aff. at ¶¶ 6, 11.) Another customer, Mary Jordan, swore out a warrant against Smith for theft by deception, but later dropped the charges and then pursued and won a civil suit. (J. Smith Dep. at 35.) Other incidents occurred in which the Smiths called the police with regard to customer disputes, as well.

civil issues, whereas the NCIC report is to be used only in criminal investigations.

The Court finds that there was no intrusion into plaintiffs' Fourth Amendment privacy interests. "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Mendenhall*, 446 U.S. 544, 553-54, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). The Court acknowledges that, "[t]o preserve the integrity and privacy of the information contained in the NCIC data base, the Federal Bureau of Investigation allows access only for criminal justice purposes, justice employment, or security clearances." *United States v. McManus*, 70 F.3d 990, 993 (8th Cir. 1995) (citing *United States v. Pedersen*, 3 F.3d 1468, 1471 (11th Cir. 1993)). Certainly, however, Chief Jones had a legitimate criminal justice purpose in accessing the NCIC, if in fact he actually ran the background check on that particular database. In a small, developing community such as Cumming, Georgia, when complaints are filed against a small business owner for allegedly violent or abusive behavior toward customers, a police officer has a defensible reason to look into the situation and act in a prophylactic manner – or, in the words of Chief Jones, "to see what in the heck you're working with." (Jones Dep. at 59.)

Moreover, the Supreme Court has said that

"'no interest legitimately protected by the Fourth Amendment' is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into 'the security a man relies upon when he places himself or his property within a constitutionally protected area.'" *United States v. Miller*, 425 U.S. 438, 440, 96 S.Ct. 1619, 1622, 48 L.Ed.2d 71 (1976) (quoting *Hoffa v. United States*, 385 U.S. 293, 301-302, 87 S.Ct. 408, 413, 17 L.Ed.2d 374, 382 (1966)). In *Miller*, the Supreme Court held that subpoenaed bank records did not fall within a protected zone of privacy because they were not "private papers" and the claimant could assert neither ownership nor possession over the records held by a third party. *Id.* Additionally, the Supreme Court noted that the claimant had no reasonable or legitimate "expectation of privacy" concerning the contents of the records of transactions maintained by the bank.[11] *Id.* at 442-43, 87 S.Ct. at 1623-24.

Similarly, plaintiff James Smith had no reasonable expectation of privacy over his criminal record or lack thereof - whether

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11 In response to *Miller*, Congress enacted the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 *et seq.*, "which provides individuals with some privacy rights in financial records that are in the hands of third parties." *Lopez v. First Union Nat'l Bank of Florida*, 129 F.3d 1186, 1190 (11th Cir. 1997). The underlying rationale of *Miller*, however, remains intact and relevant to the present case.

maintained in the NCIC by the FBI or in some other government database – where a police officer ran a background check based on legitimate investigatory concerns. Moreover, one's criminal history is, in most instances, a matter of public record. Finally, plaintiffs have failed to present evidence to show a material issue of fact regarding their allegations that Chief Jones injected himself into civil matters between the Smiths and their customers and interfered with their right to run their business without interference; indeed, at best, these are shaky state law claims based on the tort of invasion of privacy, not federal constitutional claims within the ambit of the Fourth Amendment. *See, e.g., Cabaniss v. Hopsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1996) (recognizing four categories of the tort "invasion of privacy"). Accordingly, the Court finds summary judgment appropriate with regard to plaintiffs' claim that their Fourth Amendment rights have been violated.

3. Due Process

It is uncertain which factual allegations in plaintiffs' complaint are intended to constitute a violation of due process. Moreover, plaintiffs do not specify whether they intend for their due process claims to implicate substantive or procedural due process.

Substantive due process rights are those rights held to be so fundamental that a state may not take them away. *Taylor v. Ledbetter*, 818 F.2d 791, 794 (1987) (fundamental rights

include those listed in the Bill of Rights or those incorporated through the Fourteenth Amendment such as abortion, marriage, safety and physical movement) (citations omitted). Plaintiffs have not articulated the deprivation of a fundamental constitutional right, thus plaintiffs cannot have meant for substantive due process to apply.

An individual's right to procedural due process is violated when the government interferes with his life, liberty or property without adequate procedural safeguards. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). To state a claim for a violation of procedural due process, a party must demonstrate that there has been (1) a constitutional deprivation and (2) "that the procedures employed by the state to effect this deprivation were constitutionally inadequate." *Novak v. Cobb County-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1567 (N.D. Ga. 1994) (citing *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977)). In summary, "[d]ue process essentially requires that the procedures be fair," although "[t]he process that is due varies according to the nature of the right and to the type of proceedings." *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (1992) (citations omitted).

First, plaintiffs have alleged no constitutionally protected property or liberty interest. *See Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1436 (11th Cir. 1998). Plaintiffs allege

defamation as a state law claim and/or as a claim under section 1983. Specifically, plaintiffs allege that the Cumming Police Department circulated rumors to other citizens and business owners that plaintiffs were drug dealers and "vicious people," and that Chief Jones tried to solicit customers to file civil complaints against the Smiths in an attempt to have their business license revoked.

In defamation cases brought under section 1983, the Supreme Court has determined that "allegations of injury to reputation alone do not support a section 1983 claim for violation of due process, and therefore must be accompanied by a constitutionally recognized injury." *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)). Moreover, "damages to a plaintiff's business reputation are only recoverable in a section 1983 action if those damages were incurred as a result of government action significantly altering the plaintiff's constitutionally recognized legal right." *Id.* (discussing *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)). In this case, plaintiffs have not experienced the significant alteration of some legal right or status. Specifically, plaintiffs' business license has not been revoked, nor has plaintiffs' landlord has not terminated their lease. Accordingly, because plaintiffs have suffered no constitutionally recognized injury, plaintiffs have failed to allege facts sufficient to state a genuine issue for trial with regard to their section 1983 claim of

defamation.

Plaintiffs also claim that the process by which Chief Singletary swore out the application for a warrant in response to James Smith's videotaping police traffic stops was inadequate to provide due process of law. Again, plaintiffs do not clearly allege the deprivation of a constitutionally protected property or liberty interest.[12] James Smith claims that Singletary knew the charge of obstructing law enforcement officers was "false" and that Smith "had committed no wrongful act that would justify his arrest." (P1. Response [46] at 19.)

Assuming for the sake of argument that the warrant hearing and the magistrate judge's ensuing order that James Smith stop videotaping police officers deprived Smith of a constitutionally protected liberty, the procedure employed in this matter was adequate. James Smith was given adequate notice of the warrant hearing. (*Id.*, Ex. 3, Notice of Warrant Hearing.) Moreover, the Court has determined previously that James Smith's actions constituted sufficient grounds for Chief Singletary to form a reasonable belief that Smith was in violation of

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The Court notes that, with regard to plaintiffs' claim that their due process rights have been violated by the warrant hearing before the magistrate judge, only James Smith actually has standing to bring the claim. Barbara Smith did not participate in videotaping the police officers at traffic stops, and was not a party to the warrant hearing; therefore she has no standing as to this issue.

Georgia Code Section 16-10-24. Thus, a request for a warrant hearing was a suitable method by which to address Smith's conduct. The mere completion of an application for a warrant or the issuance of a Notice of Warrant Hearing cannot comprise a claim for the violation of procedural due process. In fact, these exhibit steps taken by the Chief of Police and the City of Cumming to ensure that Smith's procedural due process rights were *not* violated. *See Auburn Medical Center, Inc. v. Peters*, 953 F. Supp. 1518, 1521 (M.D. Ala. 1996) (issuance of show cause letter was an attempt to insure that the plaintiff of meaningful opportunity to be heard and was not a violation of his procedural due process rights).

Additionally, plaintiffs complain that "Forsyth County is one of the few counties remaining in Georgia [where] the Magistrates are not required to be attorneys or have legal training." (P1. Response [46] at 19.) Plaintiffs have offered no evidence that the Magistrate Judge before whom James Smith appeared was without legal training. Thus, the Court finds it inappropriate in this instance to address the adequacy of the magistrate system maintained in Forsyth County.

Plaintiffs also complain that Chief Jones and Chief Singletary "have admitted to having informal discussions with the magistrate about cases that . . . would be coming before him." (*Id.*) This alleged *ex parte* conduct, plaintiffs maintain, violates the due process clause. (*Id.* at 20.) Procedural due process requires "an

opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Cherry v. Heckler*, 760 F.2d 1186, 1190 (11th Cir. 1985) (quoting *Matthews v. Elderidge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 32 (1976)). Certainly, any *ex parte* communications between the judiciary and the party who initiated the warrant hearing are subject to censure. Indeed, *ex parte* communications are prohibitive of procedural fairness. Plaintiffs, however, refer the Court to no admissions in the record by Chief Jones or Chief Singletary of *ex parte* conduct with regard to James Smith's warrant hearing, and the Court has found none. Without such evidence in the record, there is no genuine issue presented for trial with regard to a claim that plaintiffs' procedural due process rights have been violated.

Accordingly, the Court finds summary judgment appropriate with regard to plaintiffs' claim that their due process rights have been violated.

4. Equal Protection

Plaintiffs also claim that their constitutional right to equal protection has been violated. Plaintiffs allege neither an invidious or suspect classification nor a deprivation of a fundamental right, therefore the equal protection clause requires only that the disparate treatment alleged bear some rational relationship to legitimate government ends. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87

L.Ed.2d 313 (1985). That is, equal rights protection is violated when similarly situated persons are treated differently and that treatment is not rationally related to a legitimate state interest. *Id.*

Certainly, "[s]imilarly situated neighbors have an equal right to share in the benefits of local government." *Nordlinger v. Hahn*, 505 U.S. 1, 41, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (Stevens, J., dissenting). To provide one citizen with better police protection than another would be objectionable and discriminatory. *Id.* The Smiths allege that neighboring business owners receive better police protection than that protection afforded the Smiths and their business, DeCuff Electronics, particularly with respect to police assistance in addressing customer disputes. Nonetheless, the Smiths have failed to refer this Court to a single instance in which a similarly situated business was afforded better treatment. Indeed, bare allegations that "other" businesses are treated differently cannot comprise an equal protection claim. *See GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359, 1367 (11th Cir. 1998) (granting motion to dismiss equal protection claim where complaint merely alleged that "nameless, faceless 'other'" permit applicants received better treatment).

Moreover, plaintiffs' complain that the police have refused to provide support to deal with customers who were causing problems. (P1. Compl. [1] at ¶ 12.) Barbara Smith admits, however, that whenever police officers were

asked to remove a person from their business premises, the police officers always did so. (B. Smith Dep. at 124.) It seems that Barbara Smith's only complaint is that a police officer allowed a customer to "tell his side" before the officer asked him to leave. (*Id.*) Additionally, James Smith's deposition is replete with examples of situations in which he requested police support and, in fact, received that support. (*See, e.g.*, J. Smith Dep. at 178-79, 193; *see also* B. Smith Dep. at 93, 124.)

The Smiths' sweeping allegations that the City of Cumming Police Department discriminated against them by failing to provide police protection or treated them differently in any other manner fail to raise any concrete constitutional issue of equal protection. In *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed 497 (1944), the Supreme Court addressed a similar scenario:

> **The lack of any allegations in the complaint . . . tending to show a purposeful discrimination . . . is not supplied by the opprobrious epithets "willful" and "malicious" . . ., or by characterizing [the defendant's actions] as an unequal, unjust, and oppressive administration of the laws . . . . These epithets disclose nothing as to the purpose or consequence of [the defendant's actions] . . . . Such allegations are insufficient under our decisions to raise any issue of equal protection of**

the laws . . . .

***GJR Investments, Inc.*, 132 F.3d at 1368 (quoting *Snowden*, 321 U.S. at 10, 64 S.Ct. 397). Similarly, the brief plaintiffs submitted to this Court in response to defendant's summary judgment motion fails to even address the alleged violation of plaintiffs' right to equal protection, and states only that they have been subjected to "malicious persecution" by the police department in violation of their constitutional rights. (*See generally*, P1. Response [46].)**

Accordingly, the Court finds summary judgment appropriate with regard to plaintiffs' claim that their right to equal protection has been violated.

5. Conspiracy to Violate Plaintiff's Constitutional Rights

Plaintiffs also allege that defendants conspired to deprive them of their constitutional rights. To establish a *prima facie* case of conspiracy to violate rights protected by section 1983, a plaintiff must "show that the parties 'reached an understanding' to deny the plaintiff his or her rights." *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990); *see also Strength V. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988). Moreover, "[t]he conspiratorial acts must impinge upon the federal right; the plaintiff must prove an actionable wrong to support the conspiracy." *Bendiburg*, 909 F.2d at 468.

Plaintiffs have failed to introduce any

evidence that defendants reached an "understanding" and thereby conspired to deprive them of an ascertainable federal right. *See Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984) ("[m]ere verification of a party's own conclusory allegations is not sufficient to oppose a motion for summary judgment" with regard to section 1983 conspiracy claim); *see also GRJ Investments, Inc.*, 132 F.3d at 1370 (granting motion to dismiss because plaintiff failed to meet prerequisite of section 1983 conspiracy claim where plaintiff failed to make particularized allegations that conspiracy existed). More conclusive, however, is plaintiffs' failure to show an actual denial of their constitutional rights. As previously discussed at length, plaintiffs have failed to show any question of material fact which could establish that defendants committed an actionable wrong. As stated, a section 1983 conspiracy claim requires that there be an underlying constitutional violation. Without such, plaintiffs may not overcome defendants' motion for summary judgment with regard to plaintiffs' claim of conspiracy under section 1983. *GJR Investments, Inc.*, 132 F.3d at 1370 (failure to allege violation of constitutional rights resulted in dismissal of conspiracy claim); *see also Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 792 (11th Cir. 1992).

B. <u>Qualified Immunity</u>

Even if defendant Singletary violated plaintiff's constitutionally protected rights,

Chief Singletary is protected by qualified immunity from the imposition of personal liability against him. Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Furthermore, the government actor has qualified immunity unless the "act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." *Id.*

In addressing a qualified immunity defense, a two part analysis is used. First, the defendant must prove that he was "acting within the scope of his discretionary authority" when the allegedly wrongful acts occurred. *Hudgins v. City of Ashburn, Georgia*, 890 F.2d 396, 404 (11th Cir. 1989) (citing *Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir. 1988)). Second, if defendant provides such proof, "the burden is on the plaintiff to show that, when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified by* 14 F.3d 583 (11th Cir. 1994).

In the case at bar, it is undisputed that Chief Singletary acted within his discretionary authority with regard to the alleged defamation during Singletary's investigation of the Smiths, the background check, and the swearing out of the warrant in response to James Smith's videotaping efforts. Thus, the determination of Singletary's qualified immunity defense turns on whether a clearly established right was violated by his conduct. "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances.*" *Lassiter*, 28 F.3d at 1150 (emphasis in original). The plaintiff has the burden of showing that the federal rights which were allegedly violated were "clearly established." *Id.* Furthermore, "courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights.'" *Id.* (footnote omitted).

As the Court has explained at length, previously, plaintiffs have presented no evidence showing the existence of a genuine issue for trial on *any* of their constitutional claims. Plaintiffs are unable to establish that any action taken by the City of Cumming or by Chief Singletary was unlawful or unconstitutional. Moreover, although the Supreme Court has held that courts may no longer impose a heightened pleading requirement in section 1983 cases brought

against a municipalities, the Supreme Court has specifically declined to extend its holding to cases brought against government officials in their individual capacities. *GJR Investments, Inc.*, 132 F.3d at 1368 (citing *Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163, 167-68, 113 S.Ct. 1160, 1162, 122 L.Ed2d 517 (1993). The Eleventh Circuit has recognized previously the peril of allowing the use of "shotgun pleading" tactics to "strip government officials of the protection provided by the official immunity doctrine." *Id.* (quoting *Marx v. Gumbinner*, 855 F.2d 783, 792 (11th Cir. 1988)). Accordingly, because plaintiffs have been unable to assemble any showing of a constitutional claim, the Court grants Singletary's summary judgment motion as it relates to plaintiffs' section 1983 claims against Singletary in his individual capacity.

III. STATE LAW CLAIM OF DEFAMATION

Because all the claims over which the Court had original jurisdiction now have been removed from the case due to the Court's decision to grant defendants' motions for summary judgment with respect to all federal claims, section 1367 (c) (3) applies.[13] As the Supreme Court has observed:

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13 **Section 1367 provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367 (c) (3).**

> **A federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.**

***Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)** (footnote omitted). ***See also Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546, 1550 (11th Cir. 1992).**

The Court concludes that dismissal of the state law claim asserting defamation is appropriate in this case. "Needless decision of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring from them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed *before trial*, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S.

715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (emphasis added) (footnote omitted). Accordingly, the Court dismisses without prejudice plaintiffs' remaining state law claim of defamation.

Conclusion

For the foregoing reasons, the Court finds that defendants' Motion for Summary Judgment [35] is GRANTED as to all federal claims, and plaintiffs' state law claim of defamation is DISMISSED without prejudice.

SO ORDERED, this 11th day of January, 1999.

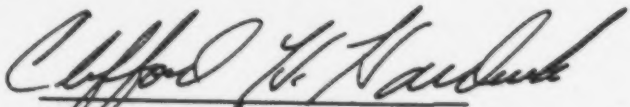
s/Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Respondents with three true copies of the foregoing Appendix by depositing same in the U.S. Mail, with proper postage affixed thereto, and addressed as follows:

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This the 25th Day of August, 2000.



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No. 00-0320

IN THE

Supreme Court of the United States

JAMES S. SMITH AND BARBARA SMITH,

Petitioners,

v.

THE CITY OF CUMMING, A MUNICIPAL CORPORATION, EARL SINGLETARY AND JOHN DOE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

Petitioners have presented two issues in their petition. One is whether their First Amendment rights were violated by Respondents when a magistrate judge, not the Respondents, ordered petitioners to stop videotaping police activities. The second issue is unclear and somewhat reminiscent of Petitioners shotgun pleading style criticized by the District Court. However, it seems to relate to alleged attempts to revoke Petitioners' business license. This issue was not addressed by the Eleventh Circuit and therefore will not be addressed here. Moreover, both of these issues are fact-intensive issues, Petitioners alleging that facts exist to support their theory and both the District Court and the Eleventh Circuit finding that there is no evidence in the record to support Petitioners' allegations. Thus, Petitioners have not raised any legal issues to be decided by this Court. For this reason alone, the petition should be denied. *See* Rule 10 of the Supreme Court of the United States.

The gravamen of the petition is based on a faulty premise. Petitioners argue that the Eleventh Circuit issued an opinion "holding that the Petitioners' First Amendment Rights were violated but affirming the lower court's granting of summary judgment to Respondents, *finding that Petitioners had suffered no damages*." Petition, p. 2 (emphasis added). This is incorrect. The Eleventh Circuit *never* held that Petitioners' First Amendment Rights had been violated, and it never addressed whether Petitioners suffered any damages. Rather, the Eleventh Circuit held that Petitioners had a right to videotape police activities, but "they [Petitioners] have not

shown that the Defendants' actions violated that right." App. to Petition, p. 4.

The foundation of the Eleventh Circuit's decision was based on the fact that none of the Respondents were responsible for the alleged infringement of Petitioners' First Amendment rights. The magistrate judge, and not the Respondents, issued an order prohibiting Petitioners from continuing their videotaping activity. This was an act of a judicial officer with no connection to the Respondents. If Petitioners did not agree with this order, then there were judicial avenues of appeal they could have pursued. Instead, they filed the instant lawsuit.

Petitioners attempt to characterize their videotaping of police officers as harmless, nonintrusive conduct. However, Chief Singletary testified that he applied for a warrant for obstruction of law enforcement because of concern by him and his officers as to what Mr. Smith was doing. Chief Singletary testified:

> They [police officers] were concerned for their physical safety because they didn't know the motivation of Mr. Smith.

Singletary Depo., p. 24

> He [Mr. Smith] was close enough to interfere with the officers, that they felt very uncomfortable with him being there.

Singletary Depo., p. 26.

> They [police officers] were constantly having to look over their shoulder to see where Mr. Smith was at, what Mr. Smith was doing. One officer on the street in the evening or at night by himself with a person that's been following you around, stalking you, becomes very uncomfortable when you don't know what his intentions are.
>
> . . .
>
> If the officer is put in that kind of position, when he doesn't know why the individual is there, then it makes the officer very nervous. It would make me very nervous, not knowing what Mr. Smith's intentions were.

Singletary Depo., p. 27.

Chief Singletary did not arrest or even detain Petitioners. Rather, the undisputed evidence shows that Chief Singletary applied for a warrant in order to obtain a judicial ruling on the propriety of Respondents' conduct in videotaping police officers. (Singletary Depo., pp. 20, 25). The magistrate

judge, not Respondents, told Mr. Smith that if he continued to videotape officers while on duty he would be arrested. (J. Smith Depo., pp. 38-39; B. Smith Depo., p. 248).

Petitioners argue that that the magistrate judge's decision was obtained through a "false affidavit" submitted by one of the Respondents. Such an affidavit is not in the record and does not exist as far as Respondents can determine. This issue was raised by the Eleventh Circuit during oral argument and Petitioners' counsel could not direct the Court to any place in the record where such an affidavit exists. To the contrary, as the district court found, the record shows that "Chief Singletary only requested the hearing before the magistrate judge because he believed the police officers for whom he was responsible were obstructed from the perform of their duties in accordance with [O.C.G.A.] section 16-10-24 – a statute that contemplates the limitation of some speech in order to effectuate its purpose." App. to Pet., p. 29. Absent Petitioners unsupported allegations, there is no evidence that Respondents did anything surreptitious or illegal in scheduling the hearing before the magistrate judge. Therefore, as the Eleventh Circuit properly held, there has been no showing that the Respondents violated Petitioners' First Amendment Rights.

CONCLUSION

The petition should be denied because Petitioners have not shown that the Eleventh Circuits decision conflicts with any other federal or state court decision, nor have they shown that the Eleventh Circuit otherwise committed error.

Respectfully submitted,

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